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*Counsel for Amazon Capital Services, Inc.
and Amazon.com Services LLC*

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	)	Case No. 1:24-bk-10228-VK
	)	Chapter 11
Mr. Tortilla, Inc.,)	
	)	AMAZON.COM SERVICES LLC AND
	)	AMAZON CAPITAL SERVICES, INC.’S
Debtor-in-Possession.	)	LIMITED OBJECTION AND
	)	RESERVATION OF RIGHTS WITH
	)	RESPECT TO DEBTOR’S EMERGENCY
	)	MOTION FOR ORDER AUTHORIZING
	)	INTERIM USE OF CASH COLLATERAL
	)	PURSUANT TO 11 U.S.C. § 363
)	
	)	<u>Hearing Scheduled For:</u>
	)	Date: March 7, 2024
	)	Time: 1:30 p.m.
	)	Place: Courtroom 301
	)	21041 Burbank Blvd. Suite 354
	)	Woodland Hills, CA 91367

Amazon Capital Services, Inc. (“ACS”) and Amazon.com Services LLC (“Amazon Services”) (collectively “Amazon”) hereby submit their limited objection and reservation of rights (the “**Reservation of Rights**”) with respect to the *Emergency Motion for Order Authorizing Interim Use of Cash Collateral Pursuant to 11 U.S.C. § 363* [Dkt. 12] (the “**Cash Collateral Motion**”) filed by the Debtor and Debtor-In-Possession Mr. Tortilla, Inc. (the “**Debtor**”). In support of this

Reservation of Rights, Amazon respectfully states as follows:

I. INTRODUCTION

ACS is a senior priority secured lender holding a perfected global security interest in the Debtor's assets, including accounts receivable, inventory and proceeds. ACS has been in dialogue with the Debtor regarding consensual terms for use of cash collateral on an interim basis with adequate protection for ACS's interests. Amazon Services has additionally been in dialogue with the Debtor regarding adequate protection of Amazon Services' interest in the vendor and seller accounts under which the Debtor does business with Amazon. On February 22, 2024, the Court granted the Debtor's Cash Collateral Motion on an interim basis until the continued hearing on March 7, 2024.

On March 1, 2024, the Debtor filed its *Motion for an Order Authorizing Debtor to Satisfy Pre-Petition Claims of Critical Vendor Amazon.com Services, LLC Necessary for Debtor's Continued Business Operation* [Dkt. 46] (the "**Critical Vendor Motion**").

Based on the Debtor's subsequent submissions, Amazon understands that the Debtor now seeks additional authority for use of cash collateral under a budget extending for six months.¹ Amazon does not object to the Debtor's use of cash collateral to the extent it receives adequate protection of its interests, but Amazon reserves the right to request additional adequate protection to the extent the Critical Vendor Motion is not approved. Additionally, given the uncertainty regarding the profitability of the Debtor's business, Amazon submits that authority to use cash collateral should be in an interim basis not to exceed two months.

II. BACKGROUND

1. Debtor is a seller of tortilla products on the Amazon.com store (the "**Amazon Store**").
2. ACS entered into a Loan Agreement with the Debtor under which it loaned money to the Debtor prepetition. On September 8, 2021, ACS filed a UCC-1 financing statement with the File No. U210083315624. Pursuant to the UCC filing, Amazon has a properly perfected priority claim

¹ Amazon has requested, but not yet received, the proposed form of order granting use of cash collateral past March 7, 2024.

1 against Debtor's assets including cash collateral generated through Amazon's seller accounts. The
2 balance of the ACS secured loan as of February 15, 2024 was \$770,925.36.

3 3. Amazon Services and certain of its affiliates on one hand, and the Debtor on the other,
4 are parties to the Vendor Terms and Conditions and related agreements, understandings, terms and
5 conditions, and purchase orders (collectively, the "**Vendor Contract**"). The Vendor Contract governs
6 the terms under which Amazon purchases products from the Debtor. The Vendor Contract permits,
7 among other things, Amazon to cancel purchase orders, return product, and deduct and net, from
8 amounts owed to the Debtor various credits authorized thereunder. The Vendor Contract provides that
9 coop including coop advertising, allowances, discounts, rebates, marketing, and other credits are set
10 forth in Amazon's program policies or in separate agreements, each of which is incorporated into the
11 Vendor Contract and the charges for each of which may be deducted from payments to the vendor for
12 purchased product. Amazon Services holds setoff and recoupment rights with respect to the vendor
13 fees and expenses that are entitled to adequate protection.

14 4. In addition, Amazon Services and certain of its affiliates on one hand, and the Debtor
15 on the other, are parties to the Business Solutions Agreement (the "**BSA**"), which governs the Debtor's
16 ability to sell products to customers on the Amazon Store. According to the terms of the BSA, the
17 Debtor's sale proceeds are held in an Amazon seller account. Under the terms of the BSA, Amazon is
18 authorized to net fees, expenses, and reimbursements from the Debtor's sale proceeds and remit, to
19 the Debtor's bank account, the Debtor's net proceeds and to establish reserves on the account at
20 Amazon's discretion. Amazon Services holds setoff and recoupment rights with respect to the seller
21 account fees and expenses that are entitled to adequate protection.

22 5. In the Cash Collateral Motion, the Debtor seeks interim use of cash collateral on the
23 terms and conditions described in the Cash Collateral Motion through March 31, 2024, including
24 making adequate protection payments to Amazon in the amount of \$5,000 per month.

25 6. On February 22, 2024, the Court granted the Debtor's Cash Collateral Motion on an
26 interim basis until the continued hearing on March 7, 2024.

7. On March 1, 2024, the Debtor filed the Critical Vendor Motion (Dkt. 46), in which it seeks authorization to satisfy Amazon Services, LLC's prepetition claims.

8. Amazon continues to discuss with the Debtor its terms of continued cash collateral usage including the form of proposed cash collateral order.

III. LIMITED OBJECTION AND RESERVATION OF RIGHTS

The Bankruptcy Code provides that the Debtor may not use cash collateral unless (a) each entity that has an interest in the cash collateral, including Amazon, consents, or (b) this Court authorizes such use in accordance with 11 U.S.C. § 363. *See* 11 U.S.C. § 363(c)(2). Section 363 provides that this Court must condition the Debtor's use of cash collateral on the Debtor providing adequate protection of any secured creditor's interest in that cash collateral. *See* 11 U.S.C. § 363(e). The requirement of adequate protection is mandatory; if the Debtor cannot offer adequate protection, the proposed use of collateral must be prohibited. *See* 3 COLLIER ON BANKRUPTCY ¶ 363.05[2] (Richard Levin & Henry J. Sommer eds., 16th ed.). Moreover, the Debtor bears the burden of proof on the issue of adequate protection. *See* 11 U.S.C. § 363(p)(1).

The requirement of adequate protection balances a debtor's need to use its cash to operate and a secured creditor's right to preserve its security interest by "allowing the debtor to use cash collateral while ensuring that the creditor will ultimately receive the full value of that collateral." *In re Proalert, LLC*, 314 B.R. 436, 441 (9th Cir. BAP 2004). "While the automatic stay preserves the status quo for debtors, adequate protection preserves the status quo for secured creditors." *In re Good*, 428 B.R. 235, 241 (Bankr. E.D. Tex. 2010). Consequently, a secured creditor "has every right to complain if the trustee or debtor in possession monkey with [its] security in a way that endangers its claim. . . ." *See In re James Wilson Assoc.*, 965 F.2d 160, 171 (7th Cir. 1992). Otherwise, the secured creditor will not receive the value for which it bargained and for which the Bankruptcy Code's adequate protection provisions were designed to ensure. *See In re O'Connor*, 808 F.2d 1393, 1396 (10th Cir. 1987).

1 Here, Amazon does not object to the Debtor's use of cash collateral to the extent Amazon's
2 interests are adequately protected. ACS's interests are adequately protected to the extent it obtains
3 replacement liens, adequate protection payments, and other measures contained in the form of order
4 negotiated with the Debtor. Amazon Services is adequately protected to the extent the Critical Vendor
5 Motion is approved authorizing Amazon Services to deduct prepetition fees and expenses from seller
6 account fees or vendor payables. To the extent the Critical Vendor Motion is not approved, Amazon
7 Services reserves the right to request additional adequate protection in the form of continued reserves
8 or other measures.

9 Further, Amazon submits that authority to use of cash collateral should not be authorized for
10 six months at this time. First, Debtor's request in its filed Cash Collateral Motion was for use through
11 March 31, 2024 (*see Cash Collateral Motion* at pg. 4). Second, although the Debtor filed projections
12 of its income and expenses for the months of March through August, that document includes a number
13 of items that must be approved by the Court, such as insider compensation and attorneys' fees. Third,
14 given Debtor's prepetition operational challenges, a six month budget for use of cash collateral is
15 simply too aggressive. A more limited interim budget is appropriate while the Debtor stabilizes,
16 operates as a debtor-in-possession and proposes its plan for treatment of creditors.

17
18 Dated: March 5, 2024

K&L GATES LLP

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*Counsel for Amazon Capital Services, Inc.
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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is K&L Gates LLP, 925 Fourth Avenue, Suite 2900, Seattle, Washington, 98104-1158.

A true and correct copy of the foregoing document entitled (*specify*):

AMAZON.COM SERVICES LLC AND AMAZON CAPITAL SERVICES, INC.'S LIMITED OBJECTION AND RESERVATION OF RIGHTS WITH RESPECT TO DEBTOR'S EMERGENCY MOTION FOR ORDER AUTHORIZING INTERIM USE OF CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On March 5, 2024, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- **Michael Jay Berger** michael.berger@bankruptcypower.com, yathida.nipha@bankruptcypower.com;michael.berger@ecf.inforruptcy.com
- **Katherine Bunker** kate.bunker@usdoj.gov
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- **United States Trustee (SV)** ustpreion16.wh.ecf@usdoj.gov

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On _____ I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on March 5, 2024, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Via FedEx

Honorable Victoria Kaufman
United States Bankruptcy Court
Central District of California
21041 Burbank Boulevard, Suite 354 / Courtroom 301
Woodland Hills, CA 91367

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

☒ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

March 5, 2024

Denise A. Lentz

/s/ Denise A. Lentz

Date

Printed Name

Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

3. Served by Email:

U.S. Trustee:

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8FIG Advance

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

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20 LARGEST UNSECURED CREDITORS

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